NO. (1)

85-2023

IN THE

Supreme Court, U.S.
FILED
JUN 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

Supreme Court of the United States

OCTOBER 1985 TERM

LEVENCE JOHN MATTE,

Plaintiff,

versus

ZAPATA OFFSHORE COMPANY, ET AL,

Defendants, Third-Party Plaintiffs, Petitioners,

versus

TIMCO, INC., ET AL,

Third-Party Defendants, Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the prohibitions of the Louisiana Oilfield Indemnity Act, LSA R.S. 9:2780, nullify an indemnity agreement contained in a contract performed on a fixed platform on the Outer Continental Shelf, notwithstanding *United States v. Seckinger*, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970).

2. Whether the U.S. Fifth Circuit Court of Appeals improperly applied *Rodrigue v. Aetna Casualty & Surety Company*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969) in rejecting federal common law on indemnity in favor of the Louisiana Oilfield Indemnity Act

INTERESTED PARTIES

(1)

Kerr-McGee Corporation

(2)

Zapata Off-Shore Company

(3)

Timco Services, Inc.

(4)

Royale Belge Insurance Company

(5)

Christopher Tompkins
and
Howard L. Murphy
of
Deutsch, Kerrigan & Stiles

(6)

Edward F. LeBreton, III
of
Phelps, Dunbar, Marks, Claverie & Sims

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CITATION TO OPINION DELIVERED IN COURT BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 784 F.2d 628.

STATEMENT OF JURISDICTION

Jurisdiction is invoked under 28 U.S.C. §1254(1) to review the U.S. Fifth Circuit Court of Appeals' decree affirming a lower court order which dismissed petitioners' third-party complaint for indemnification. The Fifth Circuit's opinion and order were filed on March 10, 1986.

STATUTE IN QUESTION

The Louisiana Oilfield Indemnity Act of 1981, Acts 1981, No. 427, §1, effective September 11, 1981, found at La. R.S. 9:2780 (Supp. 1986), provides:

> A. The legislature finds that an inequity is foisted on certain contractors and their employees by the defense or indemnity provisions, either or both, contained in some agreements pertaining to wells for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, to the extent those provisions apply to death or bodily injury to persons. It is the intent of the legislature by this Section to declare null and void and against public policy of the state of Louisiana any provision in any agreement which requires defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault (strict liability) on the part of the indemnitee, or an agent or employee of the indemnitee, or an independent contractor who is directly responsible to the indemnitee.
>
> B. Any provision contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, is void and unenforceable to the extent that it purports to or does provide for defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of or resulting from death or bodily injury to persons, which is caused by or results

STATUTE IN QUESTION (Continued)

from the sole or concurrent negligence or fault (strict liability) of the indemnitee, or an agent, employee, or an independent contractor who is directly responsible to the indemnitee.

C. The term "agreement," as it pertains to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, as used in this Section, means any agreement or understanding, written or oral, concerning any operations related to the exploration, development, production, or transportation of oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, including but not limited to drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, altering, plugging, or otherwise rendering services in or in connection with any well drilled for the purpose of producing or excavating, constructing, improving, or otherwise rendering services in connection with any mine shaft, drift, or other structure intended for use in the exploration for or production of any mineral, or an agreement to perform any portion of any such work or services or any act collateral thereto, including the furnishing or rental of equipment, incidental transportation, and other goods and services furnished in connection with any such service or operation.

STATUTE IN QUESTION (Continued)

D. (1) The provisions of this Section do not affect the validity of any insurance contract, except as otherwise provided in this Section, or any benefit conferred by the worker's compensation laws of this state, and do not deprive a full owner or usufructuary of a surface estate of the right to secure an indemnity from any lessee, operator, contractor, or other person conducting operations for the exploration or production of minerals on the owner's land.

(2) Any language in this Section to the contrary notwithstanding, nothing in this Section shall affect the validity of an operating agreement or farmout agreement, as defined herein, to the extent that the operating agreement or farmout agreement purports to provide for defense or indemnity as defined in Subsection B of this Section. This exception shall not extend to any party who physically performs any activities pursuant to any agreement as defined in Subsection C of this Section. For purposes of this Subsection, operating agreement and farmout agreement shall be defined as follows:

(a) "Operating agreement" means any agreement entered into by or among the owners of mineral rights for the joint exploration, development, operation, or production of minerals.

STATUTE IN QUESTION (Continued)

(b) "Farmout agreement" means any agreement in which the holder of the operating rights to explore for and produce minerals, the "assignor", agrees that it will, upon completion of the conditions of the agreement, assign to another, the "assignee", all or a portion of a mineral lease or of the operating rights.

E. This Section shall have no application to public utilities, the forestry industry, or companies who drill with the Frasch Process, so long as the work being performed is not any of the operations, services, or activities listed in Subsection C above, except to the extent those services or activities include drilling through the Frasch Process.

F. The provisions of this Section do not apply to loss or liability for damages, or any other expenses, arising out of or resulting from:

(1) Bodily injury or death to persons arising out of or resulting from radioactivity; or

(2) Bodily injury or death to persons arising out of or resulting from the retainment of oil spills and clean-up and removal of structural waste subsequent to a wild well, failure of incidental piping or valves and separators between the well head and the pipelines or failure of pipelines, so as to protect the safety

STATUTE IN QUESTION (Continued)

of the general public and the environment; or

(3) Bodily injury or death arising out of or resulting from performance of services to control a wild well so as to protect the safety of the general public or to prevent depletion of vital natural resources.

The term "wild well," as used in this Section, means any well from which the escape of salt water, oil, or gas is unintended and cannot be controlled by the equipment used in normal drilling practices.

G. Any provision in any agreement arising out of the operations, services, or activities listed in Subsection C of this Section of the Louisiana Revised Statutes of 1950 which requires waivers of subrogation, additional named insured endorsements, or any other form of insurance protection which would frustrate or circumvent the prohibitions of this Section, shall be null and void and of no force and effect.

H. The provisions of this Act do not deprive a person who has transferred land, with a reservation of mineral rights, of the right to secure an indemnity from any lessee, operator, contractor, or other person conducting operations for the exploration or production of minerals in connection with the reserved mineral rights; provided such person does not retain a working interest or an over-

STATUTE IN QUESTION (Continued)

riding royalty interest convertible to a working interest in any production obtained through activities described in Subsection C of this Section.

I. This Act shall apply to certain provisions contained in, collateral to or affecting agreements in connection with the activities listed in Subsection C which are designed to provide indemnity to the indemnitee for all work performed between the indemnitor and the indemnitee in the future. This specifically includes what is commonly referred to in the oil industry as master or general service agreements or blanket contracts in whatever form and by whatever name. The provisions of this Act shall not apply to a contract providing indemnity to the indemnitee when such contract was executed before the effective date of this Act and which contract governs a specific terminable performance of a specific job or activity listed in Subsection C.

NO.

SUPREME COURT OF THE UNITED STATES

OCTOBER 1985 TERM

LEVENCE JOHN MATTE,

Plaintiff,

versus

ZAPATA OFFSHORE COMPANY, ET AL,

Defendants, Third-Party Plaintiffs, Petitioners,

versus

TIMCO, INC., ET AL,

Third-Party Defendants, Respondents.

STATEMENT OF THE CASE

MAY IT PLEASE THE COURT:

Kerr-McGee Corporation is the owner of a fixed platform located on the Outer Continental Shelf in Ship Shoal Block No. 238, approximately fifty miles off the coast of the State of Louisiana. It retained Zapata Off-Shore Company to erect and operate a work-over rig to drill from the platform.

After Zapata's work was underway, Timco Services, Inc., an independent casing contractor, was verbally summoned to the platform by a Kerr-McGee representative to install several thousand feet of well casing. Timco dispatched a five-man crew, including Matte. On March 28, 1982, Matte injured his neck when a joint of casing fell against him as it was being maneuvered across the drill floor. He sued Kerr-McGee and Zapata for damages for bodily injury, and those concerns filed a third-party claim for contractual indemnity against Timco and its insurer, Royale Belge Insurance Company.[1]

Petitioners each had separate master service agreements with Timco that were in effect on the date of the accident. The agreements required Timco to defend and indemnify the other party against claims brought by its own employees, even if the injuries were caused by the indemnitee's own fault.

The pertinent indemnity language in the Kerr-McGee agreement is as follows:

> "Contractor hereby indemnifies and agrees to protect, hold and save Kerr-McGee . . . harmless from and against all claims, demands and causes of action of every kind and character . . . including the cost of defense thereof, arising in favor of any person, firm or organization, including but not limited to injuries to employees of Contractor . . . on account of, arising from or resulting, directly or indirectly,

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1. **Jurisdiction in the district court was properly invoked under the Outer Continental Shelf Lands Act, 43 U.S.C. §1349(b)(1), and under diversity of citizenship, 28 U.S.C. §1332.**

> from the work and/or services performed by Contractor hereunder, whether on, off, or near the premises, or by conditions created thereby, and whether the same is caused or contributed to by the negligence of Kerr-McGee, its agents or employees."

The Zapata indemnity provision is similar except that Timco is not required to indemnify Zapata for injuries caused by Zapata's sole fault. It provides:

> "Contractor agrees to release, protect, indemnify, defend and hold Zapata harmless from and against any and all liability, claims, demands and causes of action of every kind and character, including the cost of defense thereof, arising in favor of third-parties for injury to or death . . . of third-parties, but only if such losses are caused by Contractor or its invitees' negligence and even though such losses may have been caused or contributed to by the joint or concurrent negligence (including, but not limited to any pre-existing condition, unseaworthiness of a vessel, product liability, merchantability or other legal right of recovery) of Zapata or its invitees. Notwithstanding the foregoing, Contractor is not obligated to indemnify Zapata for Zapata's sole negligence causing any such loss to any third-party."

In the district court, Timco and its insurer moved for summary judgment claiming that the indemnity obligations asserted in the third-party complaint were nullified by the terms of the Louisiana Oilfield Indemnity Act, LSA R.S. 9:2780. Kerr-McGee and Zapata opposed on several grounds,

chiefly that federal common law permits indemnification for an indemnitee's own negligence, when the contract clearly expresses such an intention, and the Outer Continental Shelf Lands Act, 43 U.S.C. §1331, *et seq.*, mandates that federal law be applied in this instance. The district court, relying on *Smith v. Shell Oil Company*, 746 F.2d 1087 (5th Cir. - 1984), which did not directly address the issue, saw no inconsistency between federal common law on indemnity, as set forth in *United States v. Seckinger*, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970) and the Louisiana statute, and ruled in Timco's favor.[2]

Thereafter, Kerr-McGee and Zapata appealed to the U.S. Fifth Circuit Court of Appeals. The appeals court rejected the argument that federal common law blocks application of the Louisiana Oilfield Indemnity Act on an O.C.S. fixed platform and affirmed the lower court's order. In so doing, the panel interpreted *Rodrigue* as holding that the law of the adjacent state is surrogate federal law on fixed platforms to the exclusion of federal common law.

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2. **Kerr-McGee and Zapata have settled with Matte.**

SUMMARY OF ARGUMENT

The federal common law, allowing indemnity in this situation, was settled by *United States v. Seckinger*, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970), long before the Louisiana Oilfield Indemnity Act became effective. The Outer Continental Shelf Lands Act provides that state law will apply on the O.C.S. where there is a gap in federal law. Here, there was no gap. Nevertheless, the Court of Appeals, misapplying *Rodrigue*, ruled otherwise. This Court should rectify the error and put to rest any doubt that *Rodrigue* held that a federal common law rule prevails over a state statute on the Outer Continental Shelf.

ARGUMENT

The adoption of state law is not automatic, and a proper analysis of whether the Louisiana Oilfield Indemnity Act should apply on an O.C.S. fixed platform must have as its logical starting point 43 U.S.C. §1333(a)(1):

> "The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed . . . to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State . . ."

As this Court underscored in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 480; 101 S.Ct. 2870, 2876; 69 L.Ed.2d 784 (1981), "[a]ll law applicable to the Outer Continental Shelf is federal law." No distinction was made by Congress between federal statutory and judge-made law.

Gulf Offshore, 453 U.S. 487, 101 S.Ct. 2880.

Rodrigue makes it clear that federal law, not state law, prevails where there is no lack of a federal law:

> "The Lands Act makes it clear that federal law, *supplemented by state law* of the adjacent State, is to be applied to these artificial islands as though they were federal enclaves in an upland State."
>
> * * *
>
> "Since federal law, because of its limited function in a federal system, might be inadequate to cope with the full range of potential legal problems, the Act supplemented gaps in the federal law with state law through the 'adoption of State law as the law of the United States.' "[3]

Thus, the starting point should be "Is there a federal law?" The Court of Appeals for the Fifth Circuit recognized this itself in *Continental Oil Company v. London Steam-Ship Owners' Mutual Insurance Association*, 417 F.2d 1030 (5th Cir. - 1969), cert. den. 397 U.S. 911, 90 S.Ct. 911, 25 L.Ed.2d 92, in which it said:

> "Whether intended as the analytical course in every instance, the court in *Rodrigue* started with the inquiry: Was there a federal law? Finding none – which eliminated also the question of inconsistency – the state law

3. 395 U.S. 355-57; 89 S.Ct. 1837-38. Emphasis added.

> which pertained to the occurrence became the exclusive federal law."[4]

Judge John R. Brown then elaborated on why state law was not meant to exclude application of federal law, which must be given first priority:

> "The necessity for state law (in the sense of a right being lost in its absence) is not the significant factor. State law becomes merely a matter of affording some gain or benefit or advantage not available if state law cannot be invoked. Such a reading, of course, puts almost 100% emphasis on the 'not inconsistent * * * with federal laws' element of § 1333(a)(2) . . . And in more austere words it imputes to Congress the purpose generally to export the whole body of adjacent law onto the Outer Continental Shelf for automatic application to any and all occurrences *unless* – with the *unless* being limited to (a) specific provisions within the Act or (b) inconsistent federal law. By whatever characterization expressed, in determining what law is to govern, that approach accords initially a superiority to adjacent state law – the question of federal law comes into play only after this process excludes state law. This is hardly in keeping with the course of legislative history in which the notion of supremacy of state law administered by state agencies was expressly rejected."

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4. 417 F.2d 1035.

* * *

> "-- the deliberate choice of federal law, federally administered, requires that 'applicable' be read in terms of necessity – necessity to fill a significant void or gap."[5]

Here, the question, "Was there a federal law?", obviously was never asked. Had it been, petitioners assert the result would have assuredly been different. Federal common law, as articulated in *United States v. Seckinger*, *supra.*, has long recognized a right of contractual indemnity for an indemnitee's own negligence. The *Seckinger* rule was originally fashioned by the Court of Appeals for the Fifth Circuit and was ratified by this Court. Although this Court reversed the result reached by the Court of Appeals, based on a difference in the interpretation of the contract language, the rule permitting indemnity for a party's own negligence remained intact:

> ". . . we agree with the Court of Appeals that a contractual provision should not be construed to permit an indemnitee to recover for his own negligence unless the court is firmly convinced that such an interpretation reflects the intention of the parties. This principle, though variously articulated, is accepted with virtual unanimity among American jurisdictions."[6]

To avoid a head-on confrontation with *Seckinger*, the Court of Appeals took the liberty of enlarging the breadth of

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5. 417 F.2d 1035-36.

6. *Seckinger*, 397 U.S. 211, 90 S.Ct. 885.

Rodrigue, expressly finding that "Congress intended that the law of the adjacent state would become surrogate federal law on fixed platforms on the Shelf, to the exclusion of rules of admiralty and common law." *Matte v. Zapata Offshore Company*, 784 F.2d 628, 630 (5th Cir. - 1986).

This seems to represent an unwarranted extension of *Rodrigue*. The only law that this Court found to be ill-suited for fixed structures on the O.C.S. and rejected was admiralty law. A reading of the three pages from *Rodrigue* that were cited by the Court of Appeals in support of this conclusion (395 U.S. 361-363) reveals not even the slightest mention of common law. Reference to the opinion, if anything, makes the Court of Appeals' mischaracterization abundantly clear:

> "Congress assumed that the admiralty law would not apply unless Congress made it apply, and then Congress decided not to make it apply. The legislative history of the Lands Act makes it clear that these structures were to be treated as islands or as federal enclaves within a landlocked State, not as vessels."[7]
>
> * * *
>
> "Careful scrutiny of the hearings which were the basis for eliminating from the Lands Act the treatment of artificial islands as vessels convinces us that the motivation for this change, together with the adoption of state law as surrogate federal law, was the view that maritime law was inapposite to these fixed

7. 395 U.S. 361, 89 S.Ct. 1840.

structures."[8]

Apparently overlooked by the Court of Appeals, in the same glance as §1333(a)(1) of the Lands Act, was the following excerpt taken from the Congressional Record, which this Court accorded considerable weight in *Rodrigue*:

> "[Ultimately, instead,] the whole body of Federal law [was made applicable] to the area [as well as state law where necessary]. Thus, the legal situation is comparable to that in the areas owned by the Federal Government under the exclusive jurisdiction of the Federal Government and lying within the boundaries of a State in the uplands." 99 Cong. Rec. 6963.[9]

Seckinger provides an adequate framework in which to resolve the contractual demands at issue here. No state law is required because no "gap" needs to be filled. In spite of this, the Fifth Circuit rebuked *Seckinger*, not only because it erroneously concluded that *Rodrigue* blocks application of federal common law on the O.C.S., but also because it supposedly does not stand for the proposition that an indemnitee can be indemnified for its own negligence. This response is remarkable, to say the least, since such an interpretation is wholly inconsistent with the Fifth Circuit's past interpretation of *Seckinger*. See, *Seal Offshore, Inc. v. American Standard, Inc.*, 736 F.2d 1078 (5th Cir. - 1984); *Corbitt v. Diamond M. Drilling*, 654 F.2d 329 (5th Cir. - 1981); *M.O.N.T. Boat Rental v. Union Oil Company*, 613 F.2d 576 (5th Cir. - 1980); *Wedlock v. Gulf Mississippi Marine*

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8. 395 U.S. 363, 89 S.Ct. 1841.

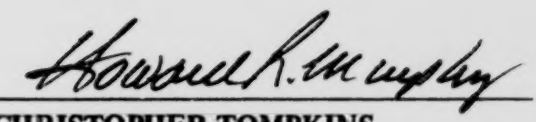
9. 395 U.S. 362, 89 S.Ct. 1840.

Corporation, 554 F.2d 240 (5th Cir. - 1977); *Transcontinental Gas Pipeline Corporation v. Mobil Drilling Barge*, 424 F.2d 684 (5th Cir. - 1970). Furthermore, the Fifth Circuit's "new" interpretation is in conflict with the U.S. Third Circuit Court of Appeals, which recently relied on *Seckinger* to decide that indemnification for an indemnitee's own negligence is permissible and not against public policy in a contractual dispute between two private parties. *Beloit Power Systems, Inc. v. Hess Oil Virgin Islands Corp.*, 757 F.2d 1427 (3rd. Cir. - 1985).

CONCLUSION

Seckinger is the rule of contract construction that should have been applied in the case *sub judice*. Use of the Louisiana Oilfield Indemnity Act is neither necessary to fill a "gap," since federal common law was already in existence to resolve this contractual indemnity issue, nor is it consistent, since the Louisiana statute prohibits indemnity for a party's own negligence and federal law allows it. For the foregoing reasons, petitioners submit that the order of the Court of Appeals merits review and should be reversed.

Respectfully submitted,



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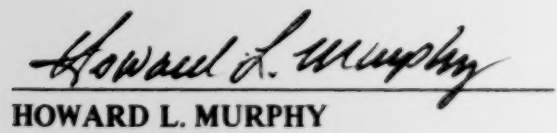
CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing petition for writ of certiorari has been served on respondents through their counsel of record, Edward F. LeBreton, III, of Phelps, Dunbar, Marks, Claverie & Sims, 30th Floor, Texaco Building, 400 Poydras Street, New Orleans, Louisiana 70130, by placing a copy of same in the United States mail, postage prepaid and properly addressed, this 7th day of June, 1986.



HOWARD L. MURPHY

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LEVENCE JOHN MATTE,
Plaintiff,

v.

ZAPATA OFFSHORE COMPANY, ET AL.,
Defendants/Third Party Plaintiffs-Appellants,

v.

TIMCO, INC., ET AL.,
Third Party Defendants-Appellees.

No. 85-3067
OPINION

Filed March 10, 1986

Before: Charles Clark, Chief Judge, Henry A. Politz, and Jerre S. Williams, Circuit Judges.

Opinion by Judge Henry A. Politz

Appeal from the United States District Court
for the Eastern District of Louisiana
Robert F. Collins, District Judge, Presiding

SUMMARY

Oil and Gas/Contracts/Insurance

Appeal from an adverse summary judgment dismissing a third-party indemnification complaint. Affirmed.

An employee of the appellee was injured in 1982 on a workover rig of appellant Zapata located on a fixed drilling platform owned by appellant Kerr-McGee. The employee was part of a crew called to the site by a verbal work order from the Kerr-McGee superinten-

dent. Appellee had earlier entered into two master service agreements obligating it to defend and indemnify appellants with Kerr-McGee in 1977 and Zapata in 1981. Invoking the Outer Continental Shelf Lands Act, the employee filed a negligence action against Zapata and Kerr-McGee, who filed a third party action against appellee, seeking defense and indemnification under the master service agreements. Appellee raised the defense of the Louisiana Oilfield Indemnity Act of 1981, which declared certain indemnity agreements null and void, and successfully moved for summary judgment dismissing the indemnity claims.

[1] Under the Lands Act, fixed offshore platforms are federal enclaves, and disputes arising on them are to be resolved by resort to the law of the adjacent state to the extent those laws are not inconsistent with federal law. [2] Louisiana's Oilfield Indemnity Act is not preempted by federal law. Congress intended that the law of the adjacent state would become surrogate federal law on fixed platforms to the exclusion of admiralty and common law. [3] It is not necessary to decide whether the application of the Oilfield Indemnity Act to the master service agreement violates state or federal contract clauses because the agreement was not a contract, but rather a document laying down ground rules for future contracts. A binding contract did not come into existence until the offer and acceptance of an individual work order, and the work order here was issued after the effective date of the Oilfield Indemnity Act. [4] The choice of law provision of the master service agreement, which specifies that general maritime law governs disputes, violated federal and state public policy, [5] and the court cannot participate in such an obvious end-run of the Louisiana legislature. [6] The choice of law provision also violates the federal policy expressed in the Lands Act seeking to apply state law to problems arising on the shelf. [7] The indemnity agreement is void and therefore unenforceable.

OPINION

HENRY A. POLITZ, Circuit Judge:

Zapata Offshore Company and Kerr-McGee Corporation appeal an adverse summary judgment dismissing their third-party indem-

nification complaint against Timco Services, Inc. and its insurer. Finding no error, we affirm.

FACTS

On March 28, 1982, Levence Matte, an employee of Timco, was injured while servicing a Zapata workover rig located on Kerr-McGee Platform No. 238, a fixed platform in the Gulf of Mexico 50 miles off the Louisiana coast. Matte was a member of a six-man Timco crew called to the rig by a verbal work order from the Kerr-McGee drilling superintendent.

Prior to the accident, Timco had entered into two master service agreements which obligated it to defend and indemnify Zapata and Kerr-McGee for any losses resulting from any personal injury claims made by Timco employees. The Kerr-McGee agreement was executed in 1977.[1] The Zapata agreement became effective in December of 1981.[2]

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[1]The pertinent indemnity language in the Kerr-McGee agreement provides:

> Contractor [Timco] hereby indemnifies and agrees to protect, hold and save Kerr-McGee ... harmless from and against all claims, demands and causes of action of every kind and character ... including the cost of defense thereof, arising in favor of any person, firm or organization, including but not limited to injuries to employees of Contractor ... on account of, arising from or resulting, directly or indirectly, from the work and/or services performed by contractor hereunder, whether on, off, or near the premises. ...

[2]The Zapata indemnification provision varies in that Timco was not required to indemnify Zapata for injuries caused by Zapata's sole negligence:

> Contractor [Timco] agrees to release, protect, indemnify, defend and hold Zapata harmless from and against any and all liability, claims, demands and causes of action of every kind and character, including the cost of defense thereof, arising in favor of third parties, but only if such losses are caused by contractor or its invitees' negligence and even though such losses may have been caused on contributed to by the joint or concurrent negligence (including, but not limited to, any pre-existing condition, unseaworthiness of a vessel, product liability, merchantability or other legal right of recovery) of Zapata or its invitees. Notwithstanding the foregoing, contractor is not obligated to indemnify Zapata for Zapata's sole negligence causing any such loss to any third party.

Matte invoked the Outer Continental Shelf Lands Act (Lands Act), 43 U.S.C. §§ 1331 *et seq.*, and filed a negligence action against Kerr-McGee and Zapata[3] who promptly filed third-party actions against Timco, seeking defense and indemnification under the master service agreements. Timco raised the aegis of the Louisiana Oilfield Indemnity Act of 1981, La. R.S. 9:2780,[4] and successfully moved for summary judgment dismissing the indemnity claims.

ANALYSIS

[1] Matte's accident occurred on a fixed platform located on the Outer Continental Shelf off the coast of Louisiana. The Lands Act proclaims that these structures are federal enclaves and any dispute arising on them is to be resolved by resort to the laws of the adja-

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[3]Although Zapata issued no work order to Timco, the first article of their agreement makes its terms and conditions applicable whenever Timco was working for any company simultaneously employing Zapata at the same location.

[4]The Louisiana Oilfield Indemnity Act of 1981, Acts 1981, No. 427, § 1, effective September 11, 1981, found at La. R.S. 9:2780 (Supp. 1986), provides in pertinent part:

> A. The legislature finds that an inequity is foisted on certain contractors and their employees by the defense or indemnity provisions, either or both, contained in some agreements pertaining to wells for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, to the extent those provisions apply to death or bodily injury to persons. It is the intent of the legislature by this Section to declare null and void and against public policy of the state of Louisiana any provision in any agreement which requires defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault (strict liability) on the part of the indemnitee, or an agent or employee of the indemnitee, or an independent contractor who is directly responsible to the indemnitee.
>
> B. Any provision contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, is void and unenforceable to the extent that it purports to or does provide for defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of or resulting from death or bodily injury to persons, which is caused by or results from the sole or concurrent negligence or fault (strict liability) of the indemnitee, or an agent, employee, or an independent contractor who is directly responsible to the indemnitee.

cent states which, "to the extent that they are applicable and not inconsistent with [the Lands Act] or with other Federal laws and regulations ... are ... declared to be the law of the United States...." 33 U.S.C. § 1333(a)(2)(A).

[2] Appellants' first contention is that the Oilfield Indemnity Act conflicts with and is preempted by the federal common law expressed in *United States v. Seckinger*, 397 U.S. 203 (1970). We recently rejected this argument in *Doucet v. Gulf Oil Corporation*, ___ F.2d ___ (5th Cir. 1986), and we do so again. As the Supreme Court made abundantly clear in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), Congress intended that the law of the adjacent state would become surrogate federal law on fixed platforms on the Shelf, to the exclusion of rules of admiralty and common law. *Id.* at 361-63. Even if *Seckinger* accurately reflected the federal common law applicable in an instance as is here presented, a proposition we do not accept, *Seckinger*'s holding and rationale would not displace the law of Louisiana, as "the law of the United States" on the Shelf adjoining Louisiana. *Rodrigue*; *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); *Knapp v. Chevron USA, Inc.*, ___ F.2d ___ (5th Cir. 1986).

Kerr-McGee maintains that the application of the Oilfield Indemnity Act to its master service agreement with Timco violates the contract clauses of both the United States[5] and Louisiana[6] Constitutions. We need not decide that issue. If the master service agreement was a contract, the Oilfield Indemnity Act, by its express terms, would not apply, for it affects only contracts executed after its effective date. La. R.S. 9:2780I. But the 1977 agreement, standing alone, is not a binding contract. The intent of the parties is clearly expressed. The agreement provided the framework for subsequent contracts which were to result from verbal or written work orders which each party remained free to accept or reject. The agreement declared simply: "this Agreement does not obligate

[5]Art I, § 10 of the Constitution of the United States provides:

> No state shall ... pass any ... law impairing the obligation of contracts....

[6]Article I, § 23 of the Louisiana Constitution of 1974 provides:

> No ... law impairing the obligation of contracts shall be enacted.

Kerr-McGee to order or authorize such work or services, nor does it obligate contractor [Timco] to accept the same."

[3] We considered the legal effect of a similar master service agreement in *Page v. Gulf Oil Corp.*, 775 F.2d 1311 (5th Cir. 1985), and there concluded that it was not a binding contract but "merely sets out the rules of the game in the event the parties decide to play ball." *Id.* at 1315. We conclude that a binding contract under the Kerr-McGee/Timco master service agreement did not come into existence until after the offer and acceptance of an individual work order. *Page*; *accord Moser v. Aminoil, U.S.A., Inc.*, 618 F. Supp. 774 (W.D. La. 1985); *Credeur v. Union Oil Co.*, No. 82-0275 (W.D. La. 1983) (Davis, J.) (printed as appendix to *Moser*, 618 F. Supp. at 782); *Wilson v. J. Ray McDermott & Co., Inc.*, 616 F. Supp. 1301 (E.D. La. 1985); *Durant v. Chevron U.S.A., Inc.*, 594 F. Supp. 527 (E.D. La. 1984); *Home Ins. Co. v. Garber Industries, Inc.*, 588 F. Supp. 1218 (W.D. La. 1984). Since the work order involved herein was issued by Kerr-McGee after the effective date of the Oilfield Indemnity Act, that legislation may be applied to preclude indemnity for Matte's injury. *See Lirette v. Union Texas Petroleum Corp.*, 467 So.2d 29 (La. App. 1985); *see also Texaco, Inc. v. Short*, 454 U.S. 516 (1982).

Zapata advances a final contention, one which has not heretofore been addressed by this court. Zapata maintains that the Oilfield Indemnity Act is not applicable to its master service agreement because of a provision contained therein. The Zapata/Timco agreement was executed after the Louisiana Legislature adopted the Oilfield Indemnity Act and it reflects an awareness of that Act. The Zapata agreement specifies:

> Whenever the work or services contemplated by this Agreement are conducted in, on or above the navigable or territorial waters of the United States or its Outer Continental Shelf, including . . . any work or services conducted on or above artificial islands or fixed structures, the law governing this Agreement shall be the General Maritime Law of the United States.

[4] The district court found this provision invalid and unenforceable. We are in full agreement with that ruling, and so hold, being

convinced that this "choice of law" provision violates the public policy of both Louisiana and the United States.

[5] Louisiana's Oilfield Indemnity Act was enacted after an express legislative finding "that an inequity is foisted upon certain contractors and their employees by the defense or indemnity provisions" which are "declare[d] null and void and against public policy of the state of Louisiana." La. R.S. 9:2780A. Louisiana's lawmakers fashioned a policy designed, in part, to remedy a perceived imbalance in the relative bargaining position of contracting parties in the oil industry, for the purpose of enhancing safety in that dangerous industry. *Knapp*. To permit parties to contract around the Oilfield Indemnity Act would reinstate as the norm their unequal bargaining positions, and defeat the purpose of that legislation. We will not participate in such an obvious end-run of the Louisiana Legislature's effort to improve oilfield safety.[7]

Louisiana permits parties to select the law which will govern their contractual relationship. This right is not absolute, however, and must yield to public policy considerations. As a Louisiana intermediate appellate court recently held in *Lirette v. Union Texas Petroleum Corp.*, 467 So.2d at 32:

> "Parties are free to contract as to the law applicable to their agreements, and such stipulations will be given effect in the courts . . . unless there are legal or strong public policy considerations justifying the refusal to honor the contract as written." *ADR v. Graves*, 374 So.2d 699 (La. App. 1st Cir. 1979). *Davis v. Humble Oil & Refining Company*, 283 So.2d 783 (La. App. 1st Cir. 1973).

See also NCH v. Broyles, 749 F.2d 247 (5th Cir. 1985) (Louisiana law). As a Lands Act court, we apply that Louisiana rubric. *Rodrigue*; *Huson*. The public policy of Louisiana is clear, certain, and unambiguous. Any provision which purports to provide a defense or indemnity to an indemnitee for claims for injury or death alleged to have been caused by the indemnitee's negligence or

[7]Viewed through the prism of the findings of the Louisiana Legislature, we give no credence to Zapata's assertion that Timco "voluntarily" forfeited the protections extended to it and its employees by La. R.S. 9:2780.

strict liability accountability, is "void and unenforceable." La. R.S. 9:2780B.

[6] We further conclude that the Zapata choice-of-law provision violates the federal policy expressed in the Lands Act, which seeks to apply the substantive law of the adjacent states to problems arising on the Shelf. This policy of federal deference reflects the Congress's recognition of the special relationship which exists between the Outer Continental Shelf and the adjacent states. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981); *Rodrigue; Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223 (5th Cir. 1985).

[7] We therefore hold that the Zapata/Timco indemnity agreement is void and unenforceable to the extent that it is contrary to the express terms and conditions of the Louisiana Oilfield Indemnity Act of 1981.

The judgment of the district court dismissing the third-party indemnification complaint against Timco and its insurer is AFFIRMED.

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NO. 85-2023

Supreme Court, U.S.
FILED
JUN 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER 1985 TERM

LEVENCE JOHN MATTE,

Plaintiff,

versus

ZAPATA OFFSHORE COMPANY, ET AL,

Defendants, Third-Party Plaintiffs, Petitioners,

versus

TIMCO, INC., ET AL,

Third-Party Defendants, Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Supplemental Appendix of Petitioners

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DISCLOSURE PURSUANT TO U.S. SUPREME COURT RULE 28.1

Zapata Off-Shore Company is a wholly-owned subsidiary of Zapata Corporation. Subsidiaries of Zapata Off-Shore Company include Southeast Asia Rig Company, Ltd., Afcons-Zapata Off-Shore Services, Ltd., Al Muhary-Zapata, Ltd., Ugland Zapata Off-Shore A.S. and Zapata Ugland Drilling Company, Inc.

Kerr-McGee Corporation has no subsidiaries that are not wholly owned by it.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 83-1404
SECTION "C"

LEVENCE JOHN MATTE

VERSUS

ZAPATA OFFSHORE CO., ET AL.

Filed: U.S. District Court
Eastern District of LA.
January 28, 8:34 AM, 1985
Loretta G. Whyte, Clerk

MINUTE ENTRY
January 18, 1985
COLLINS, J.

DATE OF ENTRY: January 28, 1985

OPINION OF DISTRICT COURT

This matter is before the Court on motion of third-party defendants, Timco, Inc. and Royal Belge Insurance Co., seeking summary judgment on the contractual indemnity claims of defendants, Zapata Off-Shore Co. and Kerr-McGee Corp. For the reasons set forth below, the motion is hereby GRANTED.

The material facts are not disputed. Plaintiff, Levence John Matte, brought this action against Zapata and Kerr-McGee

under the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.* (OCSLA), and the general maritime law, for neck and shoulder injuries he allegedly sustained on March 28, 1982 while working for Timco as a casing hand on Zapata Rig No. 8, which was located on Kerr-McGee fixed Platform No. 238, about fifty miles off the Louisiana coast. The Timco casing crew, which included plaintiff, had been sent to the platform in response to a verbal work order made, on March 25, 1982, pursuant to earlier executed master service agreements. The "Master Service Agreement" between Timco and Kerr-McGee was executed on June 15, 1977; the "Master Service Contract" between Timco and Zapata was executed in December, 1981.[1] Both of these master service agreements contain provisions[2] requiring Timco to defend and indemnify the other party against suits such as the present one brought

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1. Although the Master Service Contract between Timco and Zapata is itself undated, the parties agree that it was executed in December, 1981.

2. Paragraph 6 of the Master Service Agreement between Timco and Kerr-McGee in full provides:

> Contractor hereby indemnifies and agrees to protect, hold and save Kerr-McGee and its co-lessees, if any, in the lease or leases operated by Kerr-McGee on their behalf, harmless from and against all claims, demands and causes of action of every kind and character (except sub-surface damage to reservoirs or formations) including the cost of defense thereof, arising in favor of any person, firm or organization, including but not limited to injuries to employees of Contractor, its agents, representatives or sub-contractors, employees of Kerr-McGee, its agents, representatives or sub-contractors, on account of, arising from or resulting, directly or indirectly, from the work and/or services performed by Contractor hereunder, whether on, off, or near the premises, or by conditions created thereby, and whether the same is caused or contributed to by

by Timco employees. When called upon to honor these contractual indemnity provisions Timco refused on grounds that these provisions were rendered null and void by LSA-R.S. §9:2780.[3] This third party action ensued.

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2. (Continued)

the negligence of Kerr-McGee, its agents or employees.

Paragraph 10 of the Master Service Contract between Timco and Zapata in full provides:

> CONTRACTOR agrees to release, protect, indemnify, defend and hold ZAPATA harmless from and against any and all liability, claims, demands and causes of action of every kind and character, including the cost of defense thereof, arising in favor of third parties for injury to or death of and/or loss of or damage to property arising in favor of third parties, but only if such losses are caused by CONTRACTOR or its invitees' negligence and even though such losses may have been caused or contributed to by the joint or concurrent negligence (including, but not limited to, any preexisting condition, unseaworthiness of a vessel, product liability, merchantability or other legal right of recovery) of ZAPATA or its invitees. Notwithstanding the foregoing, CONTRACTOR is not obligated to indemnify ZAPATA for ZAPATA's sole negligence causing any such loss to any third party.

3. LSA-R.S. §9:2780 provides in pertinent part:

> A. The legislature finds that an inequity is foisted on certain contractors and their employees by the defense or indemnity provisions . . . contained in some agreements pertaining to wells for oil, gas, or water, or drilling for minerals . . . to the extent those provisions apply to death or bodily injury to persons. It is the intent of the legislature by this Section to declare null and void and against public policy of the state of

Although no material factual disputes exist, Zapata and Kerr-McGee contend that Timco is not entitled to judgment as a matter of law for three reasons. These three reasons are discussed individually below.

The first contention, asserted by both defendants, is that LSA-R.S. §9:2780 does not apply to this OCSLA case, via

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3. (Continued)

> **Louisiana any provision in any agreement which requires defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault (strict liability) on the part of the indemnitee . . or any independent contractor who is directly responsible to the indemnitee.**
>
> . . . .
>
> **I. This Act shall apply to certain provisions . . . designed to provide indemnity to the indemnitee for all work performed between the indemnitor and the indemnitee in the future. This specifically includes what is commonly referred to in the oil industry as master or general service agreements or blanket contracts in whatever form . . . . The provisions of this Act shall not apply to a contract providing indemnity to the indemnitee when such contract was executed before the effective date of this act [September 11, 1981] and which contract governs a specific terminable performance of a specific job or activity . . . .**

43 U.S.C. §1333(2)(A),[4] as *Rodrigue*[5] surrogate federal law, because it is inconsistent with existing federal common law, which defendants contend permits indemnification for the indemnitee's own negligence. The Fifth Circuit's recent decision in *Smith v. Shell Oil Co.*, Nos. 82-4364, 83-4056, slip op. at 947 & n.9 (5th Cir. Nov. 27, 1984), which expressly adopted LSA-R.S. §9:2780 as surrogate federal law but found it retroactively inapplicable under the facts of that case, clearly establishes that defendants' first contention is meritless. *See also Mills v. Zapata Drilling Co.*, 722 F.2d 1170 (5th Cir. 1983).

The second contention, asserted by Kerr-McGee only,[6] is that LSA-R.S. §9:2780, which became effective September 11, 1981, cannot constitutionally be applied retroactively to impair the indemnity provision contained in Kerr-McGee's June 15, 1977 Master Service Agreement with Timco. The Court's research has revealed four cases in which the deciding court refused to apply LSA-R.S. §9:2780 retroactively to

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4. 43 U.S.C. §1333(2)(A) provides in pertinent part:

> To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws . . . the civil and criminal laws of each adjacent State . . . are declared to be the law of the United States . . . .

5. *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352 (1969).

6. Zapata does not assert this contention concerning retroactive application of LSA-R.S. §9:2780, because it entered into its Master Service Contract with Timco in December, 1981, three months after the effective date of the statute.

nullify indemnity provisions.[7] All of those cases have one fact in common with the present case – the master service agreement, or its equivalent, was entered into prior to the effective date of LSA-R.S. §9:2780.[8] However, all of those cases are factually distinguishable from the instant case in one critical respect – only in this case was the specific job contract (*i.e.*, the verbal work order) entered into *after* the effective date of LSA-R.S. §9:2780.[9] Thus, the Court concludes that only in this case is the statute operating *prospectively* to prevent the operation of a contra bones mores indemnity provision that is part of a contract entered

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7. *Smith v. Shell Oil Co.*, Nos. 82-4364, 83-4056, slip op. at 947-48 (5th Cir. Nov. 27, 1984); *Cossey v. Atlantic Richfield Co.*, No. 82-3173 (E.D. La. May 4, 1983) (minute entry denying motion for summary judgment based on LSA-R.S. §9:2780) (attached to Timco's *Memorandum In Support of Motion for Summary Judgment*); *Tobin v. Gulf Oil Corp.*, 535 F. Supp. 116 (E.D. La. 1982); *Great Atlantic Insurance Co. v. Martin Services International, Inc.*, 445 So.2d 146, 148 (La. 3d Cir. 1984).

8. In *Smith*, "the blanket service agreement [containing the indemnity provision] was entered into in May, 1980." *Smith*, slip op. at 948. In *Tobin*, the workover contract containing the indemnity provision was entered into on December 13, 1979. In *Great Atlantic*, the insurance policy amendment giving rise to the insurer's indemnity exposure was executed on March 17, 1980. Finally, the minute entry in *Cossey* gives no specific date but expressly states that the master service contract was entered into prior to September 11, 1981, the effective date of LSA-R.S. §9:2780.

9. In *Smith*, the injury occurred in November, 1980 (obviously the specific job contract must have been entered into prior to the injury). In *Cossey*, though no specific date is given, the Court explicitly stated that "the specific job contract (the phone call) [was] entered into prior to the effective date of [LSA-R.S. §9:2780]." In *Tobin*, the injury occurred on June 4, 1980. Finally, in *Great Atlantic*, the injury occurred on March 24, 1980.

into *after* the effective date of the statute.[10] Such a prospective application of the statute is entirely constitutional. Accordingly, the Court rejects this second contention.

Finally, the third contention, asserted by Zapata alone,[11] is that the Court should give effect to the choice of law provi-

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10. Implicit in the Court's conclusion is the underlying conclusion that a specific job contract was entered into on March 25, 1982, which, though consisting of both the master service agreement and the verbal work order, was formed on the date of the verbal work order, *i.e.*, after the effective date of LSA-R.S. §9:2780. The decision cited by Kerr-McGee, *First National Mortgage Corp. v. Manhattan Life Insurance Co.*, 360 So.2d 264 (La. 4th Cir. 1978), is simply not to the contrary.

In *First National*, the Court said:

> Each mortgage loan agreement was executed pursuant to the terms of the servicing agreement. Thus, it can be said that there existed numerous contracts between the parties, consisting of both the principal servicing agreement and all of the separate loan agreements.

Id. at 268. That language accords with this Court's determination that the specific job contract consisted of both the June 15, 1977 master service agreement and the March 25, 1982 verbal work order. More importantly though, that language has no bearing whatsoever on this Court's determination that the formation date of the specific job contract was March 25, 1982, despite the fact that it incorporated terms from an earlier agreement.

11. Only Zapata's contract with Timco expressly provides for the application of the General Maritime Law. *See* paragraph 23 of Zapata's Master Service Contract with Timco. Thus, only Zapata contends that the choice of law provision in its contract should be given effect and the General Maritime Law applied. However, Kerr-McGee also argues that the General Maritime Law should govern its contract with Timco, because most of the work done by Timco pursuant to that contract was performed on vessels. With Kerr-McGee's contention, the Court strongly disagrees. That Timco may have performed most of its work for Kerr-

sion in its Master Service Contract with Timco, which states that "the law governing the Agreement shall be the General Maritime Law." Timco/Zapata *Master Service Contract* at Paragraph 23. The Court concludes that it must declare the contractual choice of law provision void as against public policy, *see Great Atlantic*, 445 So.2d at 148, because LSA-R.S. §9:2780 is an express legislative prohibition[12] against indemnity provisions, such as the one at issue herein, that exonerate the indemnitee from its own negligence.[13] Accordingly, the Court rejects this final contention.

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11. (Continued)

McGee on vessels is irrelevant. The specific job contract, pursuant to which Timco was engaged at the time of plaintiff's alleged injury, was performed on a fixed platform and is governed by Louisiana law, not maritime law.

12. *See Delhomme Industries, Inc. v. Houston Beechcraft, Inc.*, 669 F.2d 1049, 1058-59 (5th Cir. 1982) (discussing at length Louisiana rule on judicial invalidation of contractual choice of law provisions for public policy reasons). The Court finds that Timco has met its burden of establishing that the choice of law provision in its contract with Zapata is void as against public policy under the rule as propounded in *Delhomme* and the cases cited therein. *See also Burbank v. Ford Motors*, 703 F.2d 865 (5th Cir. 1983).

13. The language of the statute itself and the three transcripts of subcommittee hearings, attached to defendants' initial opposition memorandum, clearly indicate that the legislature was attempting to enhance the safety of oil field workers, as much as it was attempting to reduce the insurance burden of oil field service companies, in deciding to declare such indemnity provisions void as against public policy. Paragraph A of the statute states that "[t]he legislature finds that an inequity is foisted on certain contractors *and their employees*" (emphasis added) by such indemnity provisions. In addition, at numerous places throughout the three transcripts of subcommittee hearings on this issue legislators and testifying witnesses discussed such indemnity provisions as being contrary to public policy and morals. Perhaps most

In summation, the Court finds that there are no issues of material fact and Timco is entitled to judgment as a matter of law. Accordingly, summary judgment in favor of Timco is appropriate.

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13. (Continued)

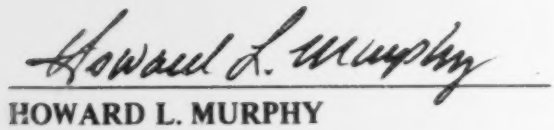
importantly though are the concerns that such indemnity provisions may well cause the exonerated indemnitee to become lax in its concern for the safety of oil field workers. *See, e.g.*, pp. 41 & 40 of the transcript of the October 29, 1980 subcommittee meeting, and pp. 55 & 56 of the transcript of the February 10, 1981 subcommittee meeting. This concern for worker safety, which found its way into the language of paragraph A of the statute, clearly demonstrates that LSA-R.S. §9:2780 is an express legislative statement of a fundamental policy of this state against such indemnity provisions.

s/s Robert F. Collins

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing supplemental appendix of petitioners has been served on respondents through their counsel of record, Edward F. LeBreton, III, of Phelps, Dunbar, Marks, Claverie & Sims, 30th Floor, Texaco Building, 400 Poydras Street, New Orleans, Louisiana 70130, by placing a copy of same in the United States mail, postage prepaid and properly addressed, this 23rd day of June, 1986.



HOWARD L. MURPHY

MOTION FILED
SEP 19 1986

NO. 85-2023

In the Supreme Court of the United States

OCTOBER TERM, 1985

KERR McGEE CORPORATION and
ZAPATA OFFSHORE COMPANY
Petitioners

VERSUS

TIMCO SERVICES, INC. and
ROYALE BELGE INSURANCE COMPANY
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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September, 1986

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NO. 85-2023

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SUPREME COURT OF THE UNITED STATES
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Amoco Production Company, Marathon Oil Company, McMoRan Oil & Gas Co., Pennzoil Producing Company, Transco Exploration Company, and Union Oil Company of California, hereby respectfully move for leave to file the attached brief as *amici curiae* in support of the Petition for Writ of Certiorari. The consent of the attorney for the Petitioners has been obtained and is reflected in a letter on file with the Clerk of the Supreme Court. The consent of the attorney for the Respondents was requested but refused.

Amici curiae are companies involved in the exploration and production of the resources of the Outer Continental Shelf. Each company is involved in numerous contracts directly effected by the decision below, which applied the Louisiana Oilfield Indemnity Act, La. Rev. Stat. § 9:2780 ("the Louisiana Indemnity Act"), in a case governed by the Outer Continental Shelf Lands Act, 67 Stat. 462, 483 U.S.C. § 1331 *et seq.* ("the Lands Act"). The Lands Act, however, forbids application of state law that is inconsistent with federal law, and *amici curiae* respectfully submit that the Louisiana Indemnity Act is inconsistent with both federal common law and the Longshore and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. § 901 *et seq.* ("the Longshore Act").

The issue of the inapplicability of the Louisiana Indemnity Act on the Outer Continental Shelf has also been presented to this Court by the Petition for Writ of Certiorari filed by Gulf Oil Corporation in *Doucet v. Gulf Oil Corporation*, 788 F.2d 250 (5th Cir. 1986) (on application for rehearing), *cert. applic. pending* (No. 86-74), and *amici curiae* have filed a similar brief in support of Gulf's Petition for Writ of Certiorari in *Doucet*. As the same issue is involved in both cases, *amici curiae* request leave to file this brief beyond the normal time limit.

Petitioners herein, Kerr-McGee Corporation and Zapata Offshore Company, contend that the Louisiana Indemnity Act is inconsistent with federal common law and therefore inapplicable. *Amici curiae* wish to support that contention and wish to present the additional argument that the Louisiana Indemnity Act is inconsistent with the

Longshore Act. Either argument would be dispositive of this case, and *amici curiae* respectfully request leave to file the attached brief.

Respectfully submitted,

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STATEMENT CONCERNING INTEREST OF *AMICI CURIAE*

Amici curiae, Amoco Production Company, Marathon Oil Company, McMoRan Oil & Gas Co., Pennzoil Producing Company, Transco Exploration Company and Union Oil Company of California, are companies involved in the exploration and production of the resources of the Outer Continental Shelf. Each company is involved in many contracts directly effected by the decision below. *Amici curiae* have a vital interest in the proper interpretation of contracts governing operations offshore, and the rules of law used to interpret those contracts.

No. 85-2023

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

KERR-McGEE CORPORATION and
ZAPATA OFFSHORE COMPANY,
Petitioners

VERSUS

TIMCO SERVICES, INC. and
ROYALE BELGE INSURANCE COMPANY,
Respondents

BRIEF ON BEHALF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

SUMMARY

Amici curiae[1] submit that the Fifth Circuit Court of Appeals in this case, as in the case of *Doucet v. Gulf Oil Corp.*, 788 F.2d 250 (5th Cir. 1986) (on application for rehearing), *cert. applic. pending* (No. 86-74), misinterpreted the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C § 1331 *et seq.* (the "Lands Act"), by relying on state law that is inconsistent with federal common law and the

[1] Amoco Production Company, Marathon Oil Company, McMoRan Oil & Gas Co., Pennzoil Producing Company, Transco Exploration Company, and Union Oil Company of California.

Longshore and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. § 901 *et seq.* (the "Longshore Act").[2]

The Lands Act allows the use of state law only when there is no applicable federal law and only when the state law is "not inconsistent" with federal law. Federal common law, however, allows full contractual freedom with respect to contractual indemnity. Under *United States v. Seckinger,* 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970), a party can be indemnified for its own negligence if such intent is clearly set forth in the applicable contract. The same is true, in the non-vessel context, under the Longshore Act. The Louisiana Oilfield Indemnity Act, La. Rev. Stat. § 9:2780 (the "Louisiana Indemnity Act"), which prohibits full indemnity, is inconsistent with federal law and cannot control in a case governed by the Lands Act.

REASONS FOR GRANTING THE WRIT

I. *LOUISIANA'S PROHIBITION OF CONTRACTUAL INDEMNITY CANNOT CONTROL ON THE OUTER CONTINENTAL SHELF BECAUSE LOUISIANA LAW CONFLICTS WITH APPLICABLE FEDERAL LAW*

"All law applicable to the Outer Continental Shelf is federal law." *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473, 480, 101 S.Ct. 2870, 2876, 69 L.Ed.2d 784 (1981). If necessary, the Lands Act supplements "gaps in the

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[2] *Amici curiae* have filed this same brief in support of Gulf Oil Corporation's Petition for Writ of Certiorari in *Doucet v. Gulf Oil Corp.,* 788 F.2d 250 (5th Cir. 1986) (on application for rehearing), *cert. applic. pending,* (No. 86-74).

Federal law with state law through 'adoption of State law as the law of the United States, ' " *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 357, 89 S.Ct. 1835, 1838, 23 L.Ed.2d 360 (1969), but "federal law is 'exclusive' in its regulation of [the Outer Continental Shelf], and . . . state law is adopted only as surrogate federal law." *Id.*

Any state law incorporated by the Lands Act must be consistent with federal law. *Rodrigue, supra*, 395 U.S. at 360, 89 S.Ct. at 1839-40.

> To the extent that they are applicable *and not inconsistent* with this subchapter or with other Federal laws and regulations of the Secretary . . . , the civil and criminal laws of each adjacent State . . . are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf . . . .

43 U.S.C. § 1333(a)(2)(A) (emphasis added). Moreover, under *Rodrigue*, if there is applicable federal law, state law should not be used.

In *Rodrigue*, based on both traditional maritime principles and Congressional intent, this Court held that federal admiralty law does not govern accidents on "artificial islands" on the Outer Continental Shelf. This was not a rejection of federal common law but rather a recognition that maritime law did not extend to "accidents [that] had no more connection with the ordinary stuff of admiralty than to accidents on piers." 395 U.S. at 360, 89 S.Ct.at 1839-40. *See Herb's Welding, Inc. v. Gray*, 470 U.S. 414,

____, 105 S.Ct. 1421, 1426, 84 L.Ed.2d 406 (1985). *Rodrigue* concluded that *maritime law* was thus inapplicable to the plaintiff's non-maritime claim, and the resulting lack of applicable federal law "*remove[d] any obstacle* to the application of state law by incorporation as federal law through the Lands Act." 395 U.S. at 366, 89 S.Ct. at 1842 (emphasis added). Contrary to the Fifth Circuit's assertion in this case and *Doucet v. Gulf Oil Corp.*, 788 F.2d at 251-52, however, *Rodrigue* does not even mention federal common law and certainly does not hold that federal common law is inapplicable on the Outer Continental Shelf. As federal common law and the Longshore Act allow full indemnity, inconsistent Louisiana law cannot be relied on in a Lands Act case.

(a) Federal Common Law Allows Full Contractual Indemnity

The Louisiana Indemnity Act, La. Rev. Stat. § 9:2780, which precludes indemnity for one's own fault, directly conflicts with federal common law. *United States v. Seckinger*, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970), allows full indemnity when clearly provided for by contract and represents well-established federal common law. *See, e.g., Tran v. Manitowoc Engineering Co.*, 767 F.2d 223, 229 (5th Cir. 1985). In the instant case, however, the Fifth Circuit rejected *Seckinger's* applicability and held that, in any event, federal common law is in effect relegated to a status inferior to state law. In so holding, the court misapplied *Rodrigue* and the entire scheme of the Lands Act. Federal common law is "federal law." *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 98-100, 92 S.Ct. 1385, 1390-91, 31 L.Ed.2d 712 (1972). Therefore, inconsistent state law must yield.

Whether federal common law can be ousted by inconsistent state law was specifically discussed but not decided in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981). At issue in *Gulf Offshore* was whether the jury in a claim governed by the Lands Act should have been instructed, in accordance with federal common law,[3] that personal injury damage awards are not subject to federal income taxation.

> If Congress had been silent about the source of federal law in an OCSLA personal injury case, *Liepelt* would require that the instruction be given.
>
> But Congress was not silent. It incorporated for this case the applicable law of Louisiana, but only "[t]o the extent [it is] not inconsistent" with federal law. *The [Lands Act] does not distinguish between federal statutory and judge-made law. It would seem then that if Louisiana law is "inconsistent," Liepelt controls.*

453 U.S. at 487, 101 S.Ct. at 2880 (emphasis added). Although this Court expressed a question as to whether federal common law would necessarily control that particular case, the issue was not decided because it was unclear whether Louisiana law was in fact inconsistent with *Liepelt*.

The Fifth Circuit in *Olsen v. Shell Oil Co.*, 708 F.2d 976, 982-83 (5th Cir. 1983), *cert. denied*, 464 U.S. 1045, 104 S.Ct. 715, 79 L.Ed.2d 178 (1984), subsequently rejected the federal common law rule of *Liepelt* on the ground that the

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[3] *Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980).

underlying cause of action was derived from state law under the Lands Act. In so holding, the Fifth Circuit relied on its contention that state law governing admissibility of evidence concerning inflation was an integral component of the state law cause of action and that under *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), the *Liepelt* rule should yield to state law.

The Fifth Circuit in *Olsen*, however, misapplied *Huson*. In *Huson*, this Court held that when a cause of action for personal injury occurring on a fixed platform is based on state law, state law should provide the limitations period as well, "*subject to the absence of* inconsistent and applicable federal law." 404 U.S. at 103, 92 S.Ct. at 354 (emphasis added). As admiralty law was inapplicable under *Rodrigue*, there was no applicable federal limitations rule. Finding it inappropriate to create new federal common law, *Huson* looked to the state limitations period. Neither *Huson* nor *Rodrigue* denegrated the role of federal common law on the outer Continental Shelf; *Rodrigue* merely held "admiralty" law inapplicable to "artificial islands," and *Huson* held that because there was a "gap," it was more appropriate to rely on state law than *to create* new federal common law. Neither *Rodrigue* nor *Huson* sanctions the use of state law *that is inconsistent with established federal law,* as evidenced by the fact that the question surfaced in *Gulf Offshore,* ten years after *Huson. Huson's* decision not to create *new* federal common law is irrelevant when there is already well-established federal common law such as *Seckinger.* The Fifth Circuit 's decision in *Olsen* was therefore incorrect, and the question left open in *Gulf Offshore* must be answered.

Even if *Olsen's* rationale were correct, the critical underpinning of the decision -- that the state rule on inflation was an integral component of the underlying state law cause of action -- is not present in this case. The indemnity rule of *Seckinger* is not an integral component of any particular cause of action but rather constitutes an important part of the federal law governing contract interpretation. As stated in numerous cases following *Seckinger*,[4] the intent of the parties, when clearly expressed, should be enforced, including the intent to provide complete indemnity.

In light of *Seckinger*, there is no "gap" in this case. Moreover, ignoring such a federal rule of contract interpretation carries implications far beyond the subject of this case. That would give states adjacent to the Outer Continental Shelf the power to overrule federal law. Prior to the Louisiana Indemnity Act, Louisiana allowed complete indemnity. Louisiana decided to change its own law, but the Louisiana legislature does not have the power to overrule federal law on the Outer Continental Shelf -- particularly not when the Lands Act mandates that any incorporated state law must be consistent with federal law.

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[4] *See, e.g., Tran v. Manitowoc Engineering Co.*, 767 F.2d 223, 229 (5th Cir. 1985); *Eastern Airlines, Inc. v. Insurance Co. of North America*, 758 F.2d 132, 135 (3rd Cir. 1985); *Beloit Power Systems, Inc. v. Hess Oil Virgin Islands Corp.*, 757 F.2d 1427, 1430 (3rd Cir. 1985); *Gibbs v. United States*, 599 F.2d 36, 40-41 (2d Cir. 1979); *Smith v. United States*, 497 F.2d 500, 509 (5th Cir. 1974); *United States v. Hollis*, 424 F.2d 188, 190-91 (4th Cir. 1970).

(b) The Longshore Act, In the Non-Vessel Context, Allows Full Contractual Indemnity

The Louisiana Indemnity Act not only conflicts with *Seckinger*, it conflicts with the entire scheme of the Longshore and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. § 901 *et seq.* (the "Longshore Act"). The jurisprudential development and legislative history of the Longshore Act show that contractual indemnity is available except where specifically prohibited.

Section 905(a) of the Longshore Act[5] provides that an employee's exclusive remedy against his employer shall be that provided in the Act. This exclusivity provision precludes any claim for *tort* indemnity against an employer by a third party defendant. *Drake v. Raymark Industries, Inc.*, 772 F.2d 1007, 1021-22 (1st Cir. 1985) *cert. denied*, ___ U.S. ___, 106 S.Ct. 1994, 90 L.Ed.2d 675 (1986); *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 719-22 (2d Cir. 1978); *Ocean Drilling & Exploration Co. v. Berry Bros. Oilfield Service, Inc.* 377 F.2d 511, 512 (5th Cir.), *cert. denied*, 389 U.S. 849, 88 S.Ct. 102, 19 L.Ed.2d 118 (1967).

In contrast, however, full *contractual* indemnity is available under section 905(a), including indemnity for the fault of the indemnitee when clearly provided for by contract. *Pippen v. Shell Oil Co.*, 661 F.2d 378, 386-88 (5th Cir. 1981); *Olsen v. Shell Oil Co.*, 595 F.2d 1099, 1103-04 (5th Cir.), *cert. denied*, 444 U.S. 979, 100 S.Ct. 480, 62 L.Ed.2d 405 (1979); *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 721-22 (2d Cir. 1978). The Louisiana Indemnity Act is

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[5] 33 U.S.C. § 905(a).

therefore inconsistent with the Longshore Act.

The availability of contractual indemnity is underscored by the legislative history of the Longshore Act. Prior to the 1972 amendments to the Longshore Act, the combination of implied contractual indemnity under then section 905 (now section 905(a)) and the effect of this Court's decisions in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956), and *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946), had given rise to the so-called *Sieracki-Ryan* triangle. Under *Sieracki*, a longshoreman doing work customarily performed by a seaman was owed a warranty of seaworthiness by the vessel, which gave rise to liability without fault. Under *Ryan*, however, the vessel owner was entitled to implied contractual indemnity from the longshoreman's employer, based on the breach of an implied warranty of workmanlike performance. As a result, the employer was liable for compensation under the Longshore Act but was also often required to indemnify the vessel owner for the employee's tort recovery.

The *Sieracki-Ryan* triangle was terminated with the 1972 amendments to the Longshore Act. Congress reenacted the previous section 905 as section 905(a) and added section 905(b). Section 905(b) prohibited a "vessel" from obtaining any indemnity from the employer of the injured longshoreman, whether based on an implied or express contractual provision. There was no change, however, in the right of a "non-vessel" to obtain contractual indemnity. *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 719-22 (2d Cir. 1978).

> The shipowners got a *quid pro quo* for the loss of their indemnity rights. Prior to the 1972 amendments they were liable to injured longshoremen not only for the ship's own negligence but also on a strict liability theory (the "unseaworthiness" doctrine) for conditions which often were actually created by the stevedore. . . . The 1972 amendments eliminated the unseaworthiness theory and limited vessel liability to negligence in exchange for the surrender of the vessel's indemnity rights. . . . *No such quid pro quo was offered to non-vessels.* Given the clear statutory language and the absence of legislative history at variance with it, we would hesitate to hold that section 905(b) by its own force cuts off the availability of *Ryan* indemnity to a non-vessel in all cases where the concurring negligence of a stevedoring company has caused injuries to the latter's employees, . . . where there is a direct contractual relationship between the third party and the stevedore or where the third party is designated as a beneficiary of an express contract between the stevedore and a vessel.

Id. at 721-22 (citations and footnote omitted) (emphasis added). The Fifth Circuit, relying on *Zapico*'s rationale, has agreed.

> Until Congress more specifically abrogates this judicial remedy of contractual indemnity owed to nonvessels by the employer, it would appear to continue to be available.

Pippen v. Shell Oil Co., 661 F.2d 378, 387 (5th Cir. 1981). *See Olsen v. Shell Oil Co.*, 595 F.2d 1009, 1103-04 (5th Cir.), *cert. denied*, 444 U.S. 979, 100 S.Ct. 480, 62 L.Ed.2d 405 (1979).

Congress again amended section 905 of the Longshore Act in 1984. Section 905(c) was added to allow a "vessel" to obtain contractual indemnity in the context of a reciprocal indemnity provision. Again, however, there was no change in the availability of contractual indemnity by a non-vessel under section 905(a). When Congress amends or reenacts a statute without changing well-established jurisprudence, Congress must be considered to have ratified that jurisprudence. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 271-73, 99 S.Ct. 2753, 2762-63, 61 L.Ed.2d 521 (1979).

The Longshore Act allows complete contractual indemnity under section 905(a). Such evidence of Congressional intent cannot be ignored by a state legislature. No such result is required by or sanctioned by the Lands Act, which incorporates state law only when necessary and only when "not inconsistent" with federal law. 43 U.S.C. § 1333(a)(2)(A).

CONCLUSION

As stated by this Court in *Rodrigue*, Congress enacted the Lands Act to define the law applicable to the Outer Continental Shelf. 395 U.S. at 355, 89 S.Ct. at 1837. In so doing, Congress chose to rely on state law to fill gaps -- not to oust applicable federal law allowing freedom of contract. The exploration and development of the resources of the Outer Continental Shelf requires extensive financial commitment and the coordination of numerous companies providing an almost unlimited range of services. The development of the Shelf's resources has spawned many different companies, performing various services, pursuant to numerous different contracts. The indemnity provisions in those contracts, like all the other provisions, should be

interpreted in accordance with the intent of the parties when clearly expressed. These indemnity provisions are important in allowing the parties to a contract to allocate their respective risks of liability.

Seckinger and the Longshore Act permit such contractual allocation of risk. The *Seckinger* rule on indemnity is a single, but important, facet of the general rule of contractual freedom. The Louisiana legislature does not have the power to oust such federal law.

Uniformity may not be required in determining whether a person injured on a fixed platform off the coast of Louisiana has the same limitations period for bringing an action, or the same damage instructions to the jury, as an individual injured on a platform offshore Texas. However, basic uniformity is essential in interpreting contracts that govern economic development of the entire Outer Continental Shelf. That the Lands Act contemplated use of divergent state laws as federal law *in appropriate instances* does not justify ignoring the fact that the Lands Act incorporates state law only where "not inconsistent with [the Lands Act] or with other federal laws,"[6] whether it be the federal common law, the Longshore Act, or other federal laws.

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[6] 43 U.S.C. § 1333(a)(2)(A).

The Louisiana Indemnity Act is inconsistent with federal law. It therefore cannot apply on the Outer Continental Shelf.

Respectfully submitted,

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No. 85-2023

In The
Supreme Court of the United States
October Term, 1986

KERR-McGEE CORPORATION and
ZAPATA OFFSHORE COMPANY,

Petitioners,

vs.

TIMCO SERVICES, INC. and
ROYALE BELGE INSURANCE COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF AMICI CURIAE

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RULE 28.1 DECLARATION

Pursuant to Supreme Court Rule 28.1 Timco Services, Inc. and Royale Belge Insurance Co. state that they are affiliated to the following corporations:

DOUCET, INC.

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Respondents, Timco Services, Inc. and Royale Belge Insurance Co., submit this brief in opposition to the motion of six oil companies to file an amici curiae brief in support of the Petition for Writ of Certiorari by Kerr-McGee Corporation and Zapata Offshore Company.

The Motion to File Amici Curiae Brief was not received until September 21, 1986, and, accordingly, this opposition has been prepared hastily and initially is submitted in typewritten form.

———o———

SMALL CASE OF NO NATIONAL SIGNIFICANCE

Timco and Royale Belge waived their right to file a brief in opposition to the Petition for Writ of Certiorari for the reasons that the decision of the Court below patently was correct and that the cost of litigation of this relatively small, routine personal injury case has become utterly burdensome. Now six rich oil companies wish further to abuse the legal system of our country by filing an amici curiae brief. The original complaint of Matte was settled by Kerr-McGee and Zapata in 1984 for $35,000.00. Kerr-McGee and Zapata prosecuted their unworthy third-party complaint for indemnity through extensive motion practice in the District Court and the Court of Appeals, and, together with their six wealthy friends, they now wish to pursue the matter in the nation's highest court. Unquestionably, the legal fees for this brief writing long since have exceeded the amount originally in dispute. To allow filing of the amici curiae brief in support of the petition for writ would condone these oil companies' abuse of their greater economic resources.

Further, the case involves the application of the Louisiana Oil Field Indemnity Act, La. Rev. Stat. Ann. § 9:2780. Obviously, the construction of the Act directly affects only Louisiana. All applicable decisions of the District Courts and Fifth Circuit are consistent, and no decision of any other Court is contrary. Accordingly, no issue of national significance is involved.

In addition, the motion to file amici curiae brief is made at the eleventh hour, long after the original petition was filed. The motion is made well beyond the time provided by Supreme Court Rule 36, and movers have offered no excuse for their delay. The amici curiae brief makes a new argument not presented in the District Court, in Court of Appeals, or in petition of Zapata and Kerr-McGee. Any consideration of such argument at this time would be improper and unfair to Timco and Royale Belge.

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DECISION BELOW CORRECT

While initially a brief in opposition to the petition was thought unnecessary, in view of the Motion to File Amici Curiae Brief, Timco and Royale Belge will comment briefly.

The question on which a Writ of Certiorari is sought is whether under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* (Lands Act) there is a gap permitting the use of the Louisiana Oilfield Indemnity Act, or whether *United States v. Seckinger*, 408 F.2d 146 (5th Cir. 1969), *rev'd on other grounds*, 397 U.S. 203, 90 S.Ct.

880, 25 L.Ed. 2d 224 (1970), is "well established" federal common law and preempts the use of state law.

In drafting the Lands Act, Congress considered the possibility of applying admiralty law in order to have uniform Federal rules, but Congress rejected this idea. Rather, Congress chose to fill in the gaps in Federal statutes and regulations through adoption of state law. 43 U.S.C. §1333(a)(i); *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed. 2d 1360 (1969). In so providing, Congress expected and intended that the law applicable on the Outer Continental Shelf adjacent to the different coastal states would vary substantially. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 103-105, 92 S.Ct. 349, 30 L.Ed. 2d 296 (1971). Adoption of the argument of Kerr-McGee and Zapata would undermine the differences in state law and frustrate the intent of Congress.

Federal law is based upon the Constitution and Statutes of the United States. Many questions of commercial or contract law are not answered by the Constitution and statutes, and Federal Courts sitting in cases of federal question jurisdiction occasionally are required to create the so-called federal common law. In the present case there is no need to create or apply such law. In the Lands Act, Congress clearly expressed an intent that the Court would look to the law of the adjacent state.

Further, the interpretation advocated by Kerr-McGee and Zapata would be unworkable because it would lead to crippling uncertainty. In a Lands Act case there may be a gap to be filled by state law. What happens if another Federal Court sitting in Federal question jurisdiction

comments on the subject? Did an established federal common law rule come into existence preempting state law? Must the comment be integral to the holding or will dicta suffice? Is one holding sufficient or are more required to make "established" federal common law? Is a holding by a District Court sufficient or must the comment be by a Court of Appeals or even this Court? Surely Congress did not intend such uncertainty.

In addition, the Complaint of Matte against Kerr-McGee and Zapata was governed by state law, and it would be anomalous to decide the related indemnity question based on any other law. Cf. *Huson*, *supra*, 404 U.S. at 103 (anomalous to apply state substantive remedy and federal laches doctrine). The Louisiana Oilfield Indemnity Act is a vital and important part of Louisiana law, La. Rev. Stat. Ann. 9:2780(A), and it would be improper to allow Matte to recovery under Louisiana substantive principles but not apply correlative Louisiana indemnity principles.

Moreover, *Seckinger* is not "well established" federal law common law on the point in controversy, and, in this respect, the present case is similar to *Huson*, *supra*. In *Huson*, a Lands Act case, it was argued that in lieu of state prescription for a state cause of action, the Court should apply laches under the Federal common law. This Court rejected this argument for the reason that there was no well established federal common law rule of laches and Congress had intended to give state law broader scope. Similarly, the alleged Federal common law rule here is not well established. Petitioners rely on *Seckinger*, *supra*, but that decision was made expressly for the purpose of establishing a uniform rule under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* *Seckinger*, *supra*, 408 F.2d

at 149. The Court determined that under the Federal Tort Claims Act uniformity is a significant national priority, whereas the Lands Act itself makes clear that the applicable law will vary with the law of the adjacent state.*

Finally, amici curiae make a new, though specious, argument with respect to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* Amici curiae correctly point out that no provision of the Longshore and Harbor Workers' Compensation Act prohibits indemnity agreements between employers and non-vessel third-parties; however, the failure of the Act to make such a prohibition does not preempt the application of other law. The Longshore and Harbor Workers' Compensation Act leaves the states free to enact anti-indemnity provisions with respect to non-vessel owners, and Louisiana has done so.

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*All of the cases cited by petitioner and amici curiae as following *Seckinger* can be distinguished. Three were decided under statutes providing for liability of the United States and are inapposite in a Lands Act case. *Gibbs v. United States*, 599 F.2d 36 (2d Cir. 1979); *Smith v. United States*, 497 F.2d 500 (5th Cir. 1974); *United States v. Hollis*, 424 F.2d 188 (4th Cir. 1970). Five are admiralty cases and clearly inapplicable under *Rodrigue, supra*. *Seal Offshore, Inc. v. American Standard, Inc.*, 736 F.2d 1078 (5th Cir. 1984); *Corbitt v. Diamond M Drilling*, 654 F.2d 329 (5th Cir. 1981); *M.O.N.T. Boat Rental v. Union Oil Co.*, 613 F.2d 576 (5th Cir. 1980); *Wedlock v. Gulf Mississippi Marine Corp,*. 554 F.2d 240 (5th Cir. 1977); *Transcontinental Gas Pipeline Corp. v. Mobil Drilling Barge*, 424 F.2d 684 (5th Cir. 1970). The remaining three are diversity cases decided under state law or cases governed by the law of the Virgin Islands, and obviously are not authority for Federal common law. *Tran v. Manitowoc Engineering Co.*, 767 F.2d 223 (5th Cir. 1985); *Eastern Airlines, Inc. v. Insurance Co. of North America*, 758 F.2d 132 (3rd Cir. 1985); *Beloit Power Systems, Inc. v. Hess Oil Virgin Islands*, 757 F.2d 1427 (3rd Cir. 1985).

CONCLUSION

The litigation cost of this small personal injury case has greatly exceeded the amount in controversy, and the Motion to File Amici Curiae Brief was not made until long after the time provided by Supreme Court Rule 36. Further, under the Lands Act, *Seckinger* does not create federal common law preempting the application of the Louisiana Oilfield Indemnity Act. Accordingly, the decision of the Court below is correct, and the Motion to File Amici Curiae Brief and Petition for Writ should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that this Opposition to Motion for Leave to File Brief on behalf of Amici Curiae has been served on petitioners and Amici Curiae through their counsel of record Christopher Tompkins and Howard L. Murphy of Deutsch, Kerrigan & Stiles, 755 Magazine Street, New Orleans, Louisiana. 70130 and Donald R. Abaunza and William Waitmell Hill Pugh, III of Liskow and Lewis, One Shell Square, 50th Floor, New Orleans, Louisiana, 70139-5001, by placing a copy of same in the United States mail. postage prepaid, this 23rd day of September, 1986.

EDWARD F. LEBRETON, III
MARY CAMPBELL HUBBARD